IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.207 OF 2006

Haribhau Chimaji Vidhate
(since deceased through L.R.) & Ors. ...Appellants
Vs.
Pundalik Chimaji Vidhate & Ors. ...Respondents

Mr.G.S.Godbole for the Appellants
Mr.B.P.Apte, Senior Advocate i/b Mr.A.A.Garge for the Respondent Nos. 1 to 7.

CORAM: A.S.OKA, J.
DATED: APRIL 13,2006.

P.C.:

1. Heard the learned Counsel appearing for the parties. The Appeal is by the original Defendants. The decree for removal of encroachment to the extent of 24 R has been passed by the Trial Court and the same has been confirmed in Appeal.

2. The Civil court passed a decree for partition and separate possession between the parties in Special Civil suit No.87 of 1980. Under the said decree the Appellants were held entitled to 2/7th undivided share out of the land bearing survey No.46 which is the subject matter of the present suit. In the execution application filed for executing the decree for partition, a compromise was recorded between the parties on the basis of the consent terms. Under the consent terms, area of 7 acres out of survey no.46 was allotted to the share of the predecessor of the Appellants Haribhau and the remaining area was allotted to the share of the Respondents. The case of the Respondents is that on the

area which was allotted to them in partition, the Appellants have encroached upon to the extent of 24 R. During the pendency of the suit an Officer of the State Government was appointed as the Court Commissioner. Relying upon the map prepared by the Court Commissioner and the report submitted by him, the trial court passed a decree for removal of encroachment and the same has been confirmed in Appeal.

3. Shri Godbole for the Appellants invited my attention to the consent terms filed in execution proceedings and the order passed by the executing court. He submitted that under the consent terms though the Appellants were put in possession of area of 7 acres, the said area of 7 acres was to be confirmed after demarcation through Government Surveyor and only after the said demarcation, the Appellants were to apply for recording satisfaction of the decree. He submitted that no such demarcation was carried out and therefore the decree is not yet marked as satisfied. He submitted that the present suit is barred by section 47 of the Code of Civil Procedure, 1908. He submitted that the finding of the courts below as regards report of the court commissioner is erroneous and the court commissioner has not measured and surveyed the adjoining properties.

4. I have considered the submissions. It is not in dispute that the appellants were placed in possession of the area of

7 acres under the consent terms. In the written statement filed by the Appellants and in particular in paragraph 12 thereof, a contention was raised that the possession of the Appellants over the area of 7 acres was required to be confirmed and the survey was yet to be carried out and the boundaries were yet to be fixed. A specific contention was raised in the written statement that for resolving the dispute, a court commissioner should be appointed for measuring the area and it was accepted that the after the area of 7 acres was measured, remaining property can be used by the Respondents-Plaintiffs.

5. It is not in dispute that the competent survey officer who was appointed as the Court Commissioner by the Trial Court has carried out the survey and has demarcated the area of 7 acres which was placed in possession of the Appellants. The report of the Court Commissioner establishes the encroachment by the Appellants. In view of the specific contention raised by the Appellants in the written statement, now they cannot contend that a surveyor ought to have been appointed in the execution proceeding of the earlier decree. The exercise of carrying out the survey and demarcating the area of 7 acres allotted to the share of the Appellants was completed in this suit on the basis of the specific contention raised by the Appellants. Therefore, now it is not open for the Appellants rely upon the fact that the

decree passed in earlier suit is not formally marked as satisfied. The said decree was to be marked as satisfied on the basis of survey carried out by the Government surveyor.The contention of the Respondents was that the Appellants have encroached upon the area which was allotted to the share of the Respondents under the consent terms. For removing the said encroachment, there was no occasion for the Respondents to apply in execution proceeding of the decree passed in the earlier suit. Therefore, the submission of Shri Godbole that the suit was barred by Section 47 of the Code of Civil Procedure, 1908 has no force.

6. So far as the objection to the survey carried out by the Court Commissioner is concerned, the Courts below have considered the oral and documentary evidence on record. After considering the oral and documentary evidence on record both the Courts have accepted the survey carried out by the Court Commissioner. The report of the Surveyor discloses that the there was an encroachment committed by the Appellants to the extent of 37 R. However, in view of the limited prayer by the Respondents, the decree is confined to 24 R.

7. No substantial question of law arises. Second Appeal is dismissed with no order as to costs.

8. On the request made by Shri Godbole, decree for possession shall not be executed for a period of ten weeks from today.

Judge.